

April 19, 2016

David R. Erickson

BY ELECTRONIC MAIL

John F. Dickinson, Jr.
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Office of the Attorney General
Department of Law and Public Safety
Division of Law
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Re: Diamond Alkali Superfund Site Administrative Record -- Disclosed Documents

Dear Mr. Dickinson:

This is in response to your March 9, 2016 letter to Justin Smith in this office ("March 9 Letter").

Background of Requests

On June 30, 2015, Shook, Hardy & Bacon ("SHB") submitted requests under New Jersey's Open Public Records Act ("OPRA") to the New Jersey Department of Environmental Protection ("NJDEP") and New Jersey Department of Transportation ("NJDOT") for records relating to the Diamond Alkali Superfund Site. Rather than respond to SHB's requests, both NJDEP and NJDOT denied the requests as overbroad.

Despite the request denials, these agencies offered to provide SHB with access to records outside the scope of OPRA. In its July 9, 2015 denial, NJDEP informed SHB, "If you are interested in processing this 'information' request as a non-OPRA request, please contact Chief Records Custodian, Matthew J. Coefer, at (609) 633-1339 to discuss." July 9, 2015 NJDEP Record Request Response, attached as Exhibit 1. NJDOT reiterated this offer in its July 15, 2015 response:

In addition, this request has been denied on the basis that most of the records maintained by the NJDOT related to the subject matter of your request were transferred to the NJDEP in 2007. It is the NJDOT's understanding that you submitted an identical request to the NJDEP, and the NJDEP has agreed to provide you with records outside the scope of OPRA.

July 15, 2015 NJDOT Government Records Request Receipt, attached as Exhibit 2.

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SHB accepted NJDEP's offer to process the requests as non-OPRA requests. On September 1, 2015, NJDEP provided SHB and others with access to documents in its Diamond Alkali Superfund Site file. State employees met reviewers at NJDEP's offices in Trenton and led them to an off-site warehouse. State personnel at the warehouse selected the boxes that could be reviewed and provided them to the reviewers in a designated review room. From the boxes that the state employees provided, the reviewers identified documents they desired to copy. Reviewers were instructed that they could look at any documents in the boxes except documents contained in red folders. To SHB's knowledge, no documents were reviewed or copied from red folders. State employees transported the boxes containing these documents to NJDEP's offices, where NJDEP made them available to a vendor for copying. The copying process at NJDEP's offices took approximately one month.

The March 9 Letter requests return of 21 documents listed on Exhibit A and nine documents on Exhibit B because they were exempt from production under OPRA, protected by the attorney-client and attorney work product privileges, and subject to the Joint Prosecution and Confidentiality Agreement relating to the Contamination of the Passaic River between NJDEP, the EPA and NJDEP's other federal partners. The only support the March 9 Letter cites for return of these documents is New Jersey Rule of Professional Conduct 4.4(b). This rule applies when "[a] lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent"

Although SHB does not believe this rule is even applicable to a public records disclosure in which there is no active litigation between the requester and state agency, if the rule were applicable, SHB does not believe it has violated the rule and need not return records because (1) no authority has been identified to claw back these documents; (2) the records were not protected by any privileges, which were waived; (3) the records were not privileged even if waiver had not occurred; and (4) the records were not exempt under OPRA. Because SHB is not a party to the Joint Prosecution and Confidentiality Agreement, which is a contractual agreement between state and federal agencies, it is not a basis under which to request return of documents from SHB.¹

¹ Because it is not applicable, the validity of the Joint Prosecution and Confidentiality Agreement is not addressed in this letter. However, this agreement appears to raise serious public policy concerns, such as by allowing a federal agency to prevent release of records that a New Jersey

Despite this position, we have implemented measures to prevent further use or disclosure of the documents identified in your letter for 30 days, or until there is resolution by a court. These measures are discussed, *supra*.

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1. No Authority Has Been Identified to Claw Back These Documents

The only authority the March 9 Letter cites for clawing back the Exhibit A and B documents is New Jersey Model Rule of Professional Conduct 4.4(b). No authority has been located in which this rule provided authority to claw back documents made available in response to a public records request. Nor has any authority been located in which this rule provided authority to claw back documents outside of litigation.

Moreover, this rule would not apply to any member of the public who did not have a law license.² NJDEP should not benefit because the requestor had a law license, since the license was not the basis for making the documents available.³

If it were applicable, OPRA does not contain any claw back provision, and there is no claw back provision for non-OPRA requests. Consistent with OPRA and its stated purposes, documents made available in response to a public records request are and should be public documents that cannot be clawed back.

agency has determined should be released in response to an OPRA request. OPRA does not recognize a federal veto over state records decisions.

² The American Bar Association reports 41,000 lawyers in New Jersey. ABA National Lawyer Population Survey, Lawyer Population by State, 2015. By comparison, the U.S. Census Bureau estimates that New Jersey has just fewer than 9,000,000 residents. U.S. Census Bureau Quick Facts. Thus, even if the March 9 Letter's interpretation of Rule 4.4(b) is correct, which we do not believe it is, the rule would not apply to 99.5% of New Jersey residents.

³ This is demonstrated by the fact that not every person who reviewed documents at NJDEP on September 1, 2015 had a law degree or license.

2. The Records Were Not Protected by Any Privileges, Which Were Waived

The March 9 Letter argues that the documents listed on Exhibits A and B are privileged.⁴ However, NJDEP waived any privileges that may have applied to the documents when it made them available for review.

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A. The general rule is that privileges are waived by production to a third party.

“The attorney-client privilege is ordinarily waived when a confidential communication between an attorney and a client is revealed to a third party.” *O’Boyle v. Borough of Longport*, 218 N.J. 168, 185 (2014). Similarly, “[i]n most instances, disclosure by an attorney of his or her work product to a third party functions as a waiver of the protection accorded to an attorney’s work product.” *Id.* at 189. NJDEP waived any privileges when it made available documents to SHB, a third party.

The March 9 Letter’s only argument against waiver appears to be that the disclosure was inadvertent. Some federal courts that have considered this issue in Freedom of Information Act lawsuits have found that inadvertent disclosure resulted in waiver. *See, e.g., Goodrich v. EPA*, 593 F. Supp. 2d 184, 192 (D.D.C. 2009) (holding that disclosure of draft technical modeling information waived any applicable protection) (“We therefore agree with those courts which have held that the privilege is lost even if the disclosure is inadvertent.”) (quoting *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989)); *NRDC v. U.S. Dep’t of Defense*, 442 F. Supp. 2d 857, 865-66 (C.D. Cal. 2006) (holding documents that the government alleged had been leaked were not privileged).

New Jersey has recognized that courts apply three different approaches in determining whether inadvertent disclosure waives any applicable privileges:

1. The Strict / Traditional Approach – “[A]n inadvertent disclosure always results in a waiver.”

⁴ Although the headers to both Exhibits A and B identify the listed documents as “privileged,” the body of the March 9 Letter is more equivocal with respect to Exhibit B. Letter, p. 2 (“NJDEP believes that copies of the documents – advisory, consultative and deliberative materials that *may* also be subject to the attorney-client and attorney work product privileges -”) (emphasis added).

2. The Subjective Intent Approach – “[A]n inadvertent disclosure never results in a waiver unless the party protected by the privilege intended to waive it.”
3. The Middle / Balancing of Factors Approach – An inadvertent disclosure depends on “(1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving the party of its error.”

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Kinsella v. NYT Television, 370 N.J. Super. 311, 316-17 (App. Div. 2004). Except in limited circumstances not applicable here, courts have not decided which test applies in New Jersey.

New Jersey waived any claim to privilege under at least two of the three approaches.⁵

B. Waiver occurred under the Strict / Traditional Approach.

The Strict / Traditional Approach, in which an inadvertent disclosure always results in a waiver, seems most applicable here. NJDEP did not inadvertently produce documents in litigation, either through a production or e-mail to opposing counsel. Instead, NJDEP made the documents available to members of the public after receiving and denying an OPRA request. Even if it applied to the records at issue, OPRA contains no authority for a state agency to claw back documents it has provided to the public.

Documents should be considered public records when they are produced or made available by a state agency in response to a public records request.⁶

⁵ The third test, focusing on subjective intent, should not apply here because of the lack of precedential authority, lack of applicability to these circumstances, and lack of privilege in any event. But to the extent this test is applicable and relies on NJDEP’s subjective intent, the test could be evaluated after its development and evaluation through discovery.

⁶ This is especially true here where we incurred considerable time and expense to review the documents made available and copy certain documents with the full knowledge and consent of NJDEP.

C. Waiver occurred under the Middle / Balancing of Factors Approach.

The Middle / Balancing of Factors Approach also supports waiver. The March 9 Letter does not set forth any factual basis in support of its position that production was inadvertent.

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Based on the information available to SHB, NJDEP does not appear to have taken reasonable precautions to prevent inadvertent disclosure. NJDEP freely made boxes of documents available to SHB and others in attendance. NJDEP further handled those boxes multiple times just as part of SHB's review and copying process, but apparently without conducting the review that would have identified the documents listed on Exhibits A and B.

Rather than make documents available, NJDEP could have fulfilled SHB's OPRA request, which would have allowed NJDEP to choose which documents it would provide and which documents it would withhold as privileged. SHB then could have challenged any withheld documents through an appeals process or litigation.

NJDEP also could have arranged safeguards to accomplish its processing of the requests outside the scope of OPRA. For example, NJDEP could have by agreement attempted to provide for a clawback option.

But instead of performing its obligations and due diligence under OPRA or otherwise arranging for a clawback option, NJDEP made its documents available outside of OPRA. NJDEP cannot now require their return.

D. SHB had no reasonable cause to believe documents were inadvertently sent.

The only legal authority cited by the March 9 Letter, New Jersey Rule of Professional Conduct 4.4(b), applies when a lawyer "has reasonable cause to believe that the document was inadvertently sent" As an initial matter, no documents were sent to SHB. This is not a situation where an e-mail auto complete mistakenly included opposing counsel, or a letter to the client was incorrectly placed in the wrong envelope. Instead, NJDEP made boxes available for review at its offices and subject to its policies.

Even if the rule applies to documents that are not sent, SHB did not have reasonable cause to believe that disclosure was inadvertent. NJDEP voluntarily offered to process SHB's requests outside of OPRA. NJDEP had the opportunity to review its boxes of documents before it made them available for review, before they were transported back to NJDEP's offices, and before they were copied. Further, the presence of red folders suggested

that a privilege review had been done and any documents not in red folders were not considered privileged. Because of the voluntary process and multiple opportunities for review, SHB did not have reasonable cause to believe that documents were inadvertently sent.

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The public should be able to rely on records a government agency makes available for review and copying. Government should not be allowed to change its mind, or invent new arguments, about the classification of records after it sees how records have been used.

3. The Listed Documents Are Not Privileged

The March 9 Letter requested return of 30 documents. Based only on the first page of these documents:

- Not a single document identifies a lawyer as the author.
- Not a single document identifies a lawyer as the recipient.
- Every document is related to technical or public relations issues.
- Every document that identifies an author identifies a technical staffer or technical consultant.

The March 9 Letter claims that “even a cursory review of the documents would have revealed that NJDEP considered the documents to be privileged and that the production of the documents was inadvertent.” Letter, p. 3. This is not true. For example, Document A-45 is entitled, “We Are Far Done, Suggested Talking Points for Commissioner Jackson, Passaic River Symposium, Oct. 16 2008.” The document contains no privilege or confidentiality headers. Presumably, Commissioner Jackson may have publicly read some or all of the talking points at the Passaic River Symposium, which itself would waive any privileges.

Another example is A-175, which the March 9 Letter identifies as “March 2005, Passaic River and Newark Bay: Remediation and Restoration, Presentation to Commissioner Campbell (according to handwritten note on page 1).” This document also contains no privilege or confidentiality headers. In addition, the document contains two different sets of NJDEP production numbers, indicating that NJDEP has produced the document on at least two other occasions.

Other documents include the October 2012 draft final Focused Feasibility Study (“FFS”) report, which EPA finalized in April 2014; technical memoranda providing the bases for EPA and NJDEP technical

determinations and the FFS; and memos between staff and to file regarding technical issues.

Counsel for NJDEP appears to have implicitly admitted that at least some of the documents are not privileged. In a February 26, 2016 e-mail, counsel for NJDEP sent EPA a list of “privileged documents inadvertently produced.” *See* E-mail from John Dickinson to Sarah Flanagan re: Diamond Alkali – Lower Passaic Administrative Record, Feb. 26, 2016, attached as Exhibit 3. This e-mail identifies documents not listed in the March 9 Letter and for which NJDEP has not requested return, such as briefing and agenda materials. *See, e.g.*, A-86 and A-88. However, EPA removed from the administrative record all of the documents listed in counsel for NJDEP’s February 26, 2016 e-mail “because they were identified by [NJDEP] as privileged documents that were inadvertently produced to the CPG by NJDEP pursuant to a request made by the CPG under the New Jersey Open Public Records Act, N.J.S.A. 47-1A-1 et seq.” *Id.*

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As counsel for NJDEP appears to have implicitly admitted, it has identified documents as privileged that are not, in fact, privileged. An examination of the documents listed on the March 9 Letter demonstrates that the documents requested are not privileged and instead are factual and technical.

New Jersey asked EPA to remove documents from the administrative record on February 26, 2016, one week before EPA released the Record of Decision (“ROD”) on March 4. Counsel for New Jersey contacted SHB after the ROD’s release, on March 9. As detailed in this letter, the records requested by the March 9 Letter are technical in nature.

The timing of the removal request is not surprising considering the content of the documents New Jersey wanted removed from the administrative record. These technical documents could undermine key technical conclusions supporting the ROD’s selected remedy and analysis. But without the documents in the administrative record, EPA did not have to respond to any contradictions presented by agency technical consultants.

We do not believe these documents should have been removed from the administrative record. We respectfully request that you rescind your February 26, 2016 e-mail request to Sarah Flanagan.

4. The Records Are Not Exempt Under OPRA

OPRA defines the documents that are “government records,” the criteria for exemptions, and the procedures to challenge denials to records. However, New Jersey’s Government Records Council has argued that OPRA’s provisions come into play only for OPRA requests. *Cf.* Government Records Council’s Advisory Opinion, 2006-01 (“Thus, OPRA’s provisions come into

play only where a request for records is submitted on an agency's official OPRA records request form.").⁷

OPRA exemptions do not apply to records provided outside of OPRA. Because NJDEP processed the request outside of OPRA, none of the records provided in response to the request are exempt under OPRA. Accordingly, analysis of OPRA exemptions is not necessary.

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5. The Records Have Been Preserved in Response to the March 9 Letter

Despite our position that the records need not be returned, we have sent all members of the Cooperating Parties Group a hold notice and asked them to refrain from circulating, reviewing, or otherwise using the records until the issue has been resolved. We also have asked them to forward the letter to any other person they believe already may have received any copies of these documents.

We will maintain the hold for the next 30 days, until Tuesday, May 17. If New Jersey has not filed a declaratory judgment action with respect to these documents by that time, then we will lift the hold and resume lawful use of the documents. If New Jersey files a declaratory judgment action, then we will preserve the hold of subject documents until the conclusion of the litigation and work with you to obtain resolution from the courts.

Conclusion

For these reasons, SHB does not believe it is mandatory to return documents identified by the March 9 Letter. New Jersey law and OPRA do not provide authority for NJDEP to obtain return of documents made available in response to a public records request. NJDEP waived any privileges that may have applied by making the documents available to a third party. Even if privileges had not been waived, the documents were not privileged. In addition, OPRA exemptions do not apply because the documents were made available outside of OPRA.

Nonetheless, we will hold these documents for the next 30 days, or until there is resolution from the courts. We welcome further dialogue from your office and will review and consider any additional arguments or authority presented.

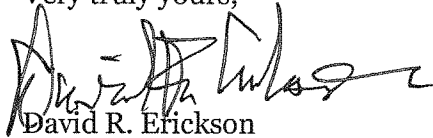
⁷ Although the Appellate Division overturned the requirement that OPRA requests only could be submitted on official forms, it did not disagree with the Government Record Council's conclusion that OPRA's provisions come into play only for OPRA requests. *Renna v. County of Union*, 407 N.J. Super. 230 (App. Div. 2009).

Thank you for your consideration.

Best regards.

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Very truly yours,



David R. Erickson

cc:

William H. Hyatt, Jr., Esq.

Jane Engel, Esq., Deputy Advisor to the Commissioner, NJDEP

Matthew Coefer, Office of Record Access, NJDDEP

Sarah Flanagan, Esq., Office of Regional Counsel, Region 2, USEPA



State of New Jersey
Department of Environmental Protection
GOVERNMENT RECORDS REQUEST FORM



IMPORTANT NOTICE

Please read this entire form carefully as it contains important information concerning the response to your record request, accessing records, disputing denials, and your rights concerning government records. For further information, access WWW.NJ.GOV/DEP/OPRA.

Requestor Information


First Name:	JUSTIN	MI	D	Last Name	SMITH
Company:	SHOOK, HARDY & BACON L.L.P.				
Mailing Address:	NOT AVAILABLE NOT AVAILABLE				
City:	Not Available	State:	OTHR	Zip:	NONE
	Email: jxsmith@shb.com				
Business Telephone:	(816) 559-2748		Extension		
Facsimile Telephone:	()-				

State Use Only

Tracking #	173826
Received Date	06/30/2015
Access Method	On-site access, visit, copy
All matters relating to the response and access of any records identified for this request should be directed to: NJDEP – Office of Record Access 401 East State Street PO Box 420 Mail Code 401-06Q Trenton, New Jersey 08625-0420 Tele #: (609) 341-3121 Fax #: (609) 292-1177	

Record Request Details:

This document request is submitted pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 et seq. This request concerns NJDEP's files relating to the Diamond Alkali Superfund Site, which includes the former pesticides manufacturing plant and surrounding properties at 80 and 120 Lister Avenue in Newark, New Jersey, the Lower Passaic River Study Area ("LPRSA") and the Newark Bay Study Area. The EPA Site ID number is NJD980528996. Please see Digital File Inventory for full request details

Disposition Notes	Record Request Response	
This request has been denied pursuant to N.J.S.A. 47:1A-1. See Addendum Disposition Notes below for further information.	In Progress	Open
	Filled	Closed
	Denied	Closed X
	Partial	Closed
Addendum Disposition Notes: Please be advised that the request is overbroad and improper. Government agencies are required to disclose only identifiable government records that are specifically described in the request. Gannett NJ Partners v Middlesex, 379 NJ Super 205, 212 (App Div 2005). OPRA does not countenance open-ended searches of agency files, MAG Entertainment LLC v Div of Alcoholic Bev Control, 375 NJ Super 534, 549 (App Div. 2005), or permits a blanket request for every document an agency has on file on a topic. Bent v Twp Of Stafford, 381 NJ Super 30, 37 (App Div 2005). In addition, this request has been denied on the basis that the request requires the NJDEP to conduct research & correlate data, which is not required pursuant to N.J.S.A. 47:1A-9 & Mag Entertainment v Div of Alcoholic Beverage Control 375 NJ Super 537 (App Div 3/05). If you are interested in processing this "information" request as a non-OPRA request, please contact Chief Records Custodian, Matthew J. Coefer, at (609) 633-1339 to discuss.	 07/09/2015	
	Custodian Signature	Date

Access to Government Records Under the New Jersey Open Public Records Act (N.J.S.A. 47:1A-1 et seq.)

Information Regarding the Requested Records		
If your request is in reference to a single facility, please provide the name of the facility, and the name of the operator name of the facility:	Facility Name: Diamond Alkali Superfund Site Operator Name:	
Please provide the owner name the facility or parcel of land:	Owner Name:	
If your request is in reference to a specific parcel of land, please provide the street address, block, lot and property owner of the parcel of land: (Note: if the property in question is over multiple blocks and lots, please list all in the description field below)	Street Address 1: 80 and 120 Lister Avenue Street Address 2: Block: Lot:	
If your request is in reference to a facility, site or parcel of land, please provide the Municipality and County where the facility, site or parcel of land is located:	County: Essex Municipality: Newark	
If the request is in reference to a particular permit issued by NJDEP, please provide the type of permit and any identifying numbers such as permit, incident or case numbers. (i.e. Fishing, Hunting, Hazardous Waste, Solid Waste, Land Use, NJPDES, Pesticides, Stream Encroachment, TWA, UST, Water Allocation)	List Permit Type:	List ID Numbers:
If your request is in reference to an individual, please provide the individual's name and type, and if the individual is a DEP employee, your relationship with the individual:	Individual's name: Type of Individual: Relationship:	
If the an individual was specified above, the individual was DEP Licensed, please specify the license type the individual holds:	License Type:	

The New Jersey Department of Environmental Protection has responded to your submitted Open Public Records Act (OPRA) record request. The following information will help you understand the response and your next available actions.

Tracking #: This is the Department's assigned Tracking # to your OPRA record request, which should be used in all corresponding matters.

Record Request Response:

- **In Progress** – Based on the nature of the request, the records sought, and/or the manner to which the records may exists, the Department requires additional time to investigate and respond to the request.
- **Filled** – Based on the information provided in your request, the Department was able to investigate and respond to your record request.
- **Denied** – Based on the nature of the request and/or the records sought, the Department has denied your request pursuant to a specific exemption(s) cited in N.J.S.A. 47:1A-1 seq.
- **Partial** – The Department has identified both responsive government records and records being denied based on the nature of the request and/or the records sought, that do not meet the definition of a government record pursuant to a specific exemption(s) cited in N.J.S.A. 47:1A-1 seq.

Disposition Notes: Provides detailed information concerning the Department's response to your request.

Accessing Records: Dependent on the volume of records and your interest, there are five (5) methods available to access the responsive government records:

- **File Review** – Schedule a file review with the Department to directly access the records and take notes or tag records of interest for copying. Copying can be performed by either the Department's onsite Copying Unit at State duplication fee costs or by the requester employing a Copy Vendor Service. If there are records stored in archives, a five-day processing period will be included prior to scheduling a review.
- **Copy Request** – All records of interest will be copied by the Department's onsite Copying Unit at State duplication fee costs unless a Copy Vendor Service is employed.
- **Electronic Records Request** – Dependent on the size & nature of the e-records, the Department will email the records or provide a CD or DVD.
- **Fax Request** – Based on the number of pages, the Department faxes the responsive records.
- **Web Access** – The responsive records can be access directly through the Department's web site. Web address will be provided.

Access to Government Records Under the New Jersey Open Public Records Act (N.J.S.A. 47:1A-1 et seq.)

1. The fees for duplication of a government record are specified below. We will notify you of any special charges, special service charges or other additional charges authorized by State law or regulation before processing your request. Payment shall be made by check or money order payable to the State of New Jersey and mailed to the address specified below.

Hard Copies:
Letter & Legal size = \$0.05 per page
Oversized Maps (Color) = \$5.00 per map
Oversized Maps (B&W) = \$3.00 per map

Electronic Records: CDs = \$0.55 per CD
DVDs = \$0.55 per DVD

2. Pursuant to OPRA (C.47:1A-5c & C.47:1A-5d), the Department will apply special service charge for any extraordinary expenditure of time and effort to accommodate a request. The special service charge will be based on the actual direct cost of providing the records. The requester shall have the opportunity to review and object to the charge prior to it being incurred; however, in the event the requester objects to the special service charge, the request will be closed and access to the records will not be granted.
3. By law, the Department must notify you that it grants or denies a request for access to government records within seven business days after the custodian of the record requested receives the request, provided that the record is currently available and not in storage. If the record requested is not currently available or is in storage, the custodian will advise you within seven business days when the record can be made available and the estimated cost. You may agree with the custodian to extend the time for making records available, or granting or denying your request.
4. You may be denied access to a government record if your request would substantially disrupt agency operations and the custodian is unable to reach a reasonable solution with you.
5. If the Department was unable to comply with your request for access to a government record, the custodian will indicate the reasons for denial on the request form.
6. Except as otherwise provided by law or by agreement with the requester, if the custodian of the record requested fails to respond to you within seven business days of receiving a request form, the failure to respond will be considered a denial of your request.
7. **Resolution of Disputed Findings:**

In the event that a requester does not agree with the Department's record response, the requester should:

No Records - Reexamined the request details to evaluate if all of the information was provided that could aid the Department in locating records. The Department's ability to identify records of interest is in direct correlation to matching the Department information with the information provided on the request. Such important identifiers are Facility/Site Name, Address, Case #, Permit #, Block/Lot.

Denial - If your request for access to a government record has been denied or unfilled within the time permitted by law, you have a right to challenge the decision by the Department to deny access. The Department denies access to records only when those records do not meet the definition of a government record and/or public access is not allowed pursuant to the law. At your option, you may either:

- a. Contact the Office of Record Access to re-visit the matter or provide further explanation.
- b. Institute a proceeding in the Superior Court of New Jersey
- c. File a complaint in writing with the Government Records Council (GRC). You may contact the GRC by toll-free telephone at 866-850-0511, by mail at PO Box 819, Trenton, NJ, 08625, by e-mail at grc@dca.state.nj.us, or at their web site at www.state.nj.us/grc. The Council can also respond to other questions about the law.

8. Information provided on this form may be subject to disclosure under the Open Public Records Act.

Revised Addendum Disposition Notes: NONE

State of New Jersey
Government Records Request
Receipt

Requestor Information

Justin D Smith
Shook, Hardy & Bacon L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108

jxsmith@shb.com
816-559-2478

Request Date: July 2, 2015

Maximum Authorized Cost: \$1,000.00

Email

Request Number: C99011

Request Status: Denied Closed

Ready Date: July 15, 2015

Custodian Contact Information

New Jersey Dept. of Transportation and
Transportation Trust Fund Authority

Records Custodian

New Jersey Department of Transportation

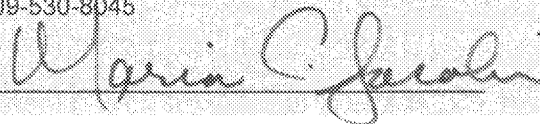
1035 Parkway Avenue

Trenton, NJ 08625-0600

NJDOT.opra@dot.state.nj.us

609-530-8045

By


Status of Your Request

Your request for government records (# C99011) from the New Jersey Dept. of Transportation and Transportation Trust Fund Authority has been reviewed and has been Denied Closed. Detailed information as to the availability of the documents you requested appear below and on following pages as necessary.

The cost and any balance due for this request is shown to the right. Any balance due must be paid in full prior to the release / mailing of the documents.

If you have any questions related to the disposition of this request please contact the Custodian of Records for the New Jersey Dept. of Transportation and Transportation Trust Fund Authority. The contact information is in the column to the right. Please reference your request number in any contact or correspondence.

Cost Information

Total Cost: \$0.00

Deposit: \$0.00

Total Amount Paid: \$0.00

Balance Due: \$0.00

Document Detail

Div	Doc #	Doc Name	Redaction Req	Pages	Legal Size	Electronic Media	Other Cost
.DW	-	July 15, 2015	N		N	N	

Denial: 39.Improper and Overbroad --- N.J.S.A. 47:1A-1 et seq.

State of New Jersey
Government Records Request
Receipt

Mr. Smith:

Please be advised that this request is overbroad and improper under the Open Public Records Act ("OPRA").

Government agencies are required to disclose only identifiable government records that are specifically described in the request, *Gannett N.J. Partners v. Middlesex*, 379 N.J. Super. 205, 212 (App. Div. 2005). Neither OPRA nor the common law countenances open-ended searches of agency files, *MAG Entertainment, LLC v. Div. of Alcoholic Bev. Control*, 375 N.J. Super. 534, 549 (App. Div. 2005), or permits a blanket request for every document an agency has on file on a topic, *Bent v. Twp. of Stafford*, 381 N.J. Super. 30, 37 (App. Div. 2005). Moreover, OPRA does not require that custodians conduct research when responding to OPRA requests. See *MAG Entm't, LLC, supra*, 375 N.J. Super. at 546-49.

Your request is essentially a blanket request for all documents on file with the NJDOT regarding the Diamond Alkali Superfund Site. As currently crafted, your request would require a number of staff members to search all of their files for responsive documents. Such a search would bring work of the NJDOT to a halt, a result that expressly transcends the legislative intent of OPRA.

In addition, this request has been denied on the basis that most of the records maintained by the NJDOT related to the subject matter of your request were transferred to the NJDEP in 2007. It is the NJDOT's understanding that you submitted an identical request to the NJDEP, and the NJDEP has agreed to provide you with records outside the scope of OPRA.

This decision is not considered to be a denial of access to documents. To the extent that you seek additional documents from the NJDOT, you may submit a new request for documents narrowing the scope or more specifically describing the documents requested.

Therefore, this request is denied and closed effective today. Thank you for the opportunity to be of assistance.

Very truly yours,
Maria C. Jacobi
NJDOT Custodian of Records

Your request for government records (# C99011) is as follows:

Please see attached letter

RECEIVED

JUL 01 2015

OFFICE OF THE INSPECTOR GENERAL

SHOOK
HARDY & BACON

June 29, 2015

Justin D. Smith

Official Custodian of Records
Office of Inspector General
New Jersey Department of Transportation
1035 Parkway Avenue
P.O. Box 600
Trenton, New Jersey 08625-0600
Email: njdot.opra@dot.nj.gov

2555 Grand Blvd.
Kansas City, Missouri
64108-2613
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jxsmith@shb.com

Re: Open Public Records Act, N.J.S.A. 47:1A-1 et seq.

Dear Custodian of Records:

This document request is submitted pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 et seq. This request concerns the New Jersey Department of Transportation's files relating to the Diamond Alkali Superfund Site, which includes the former pesticides manufacturing plant and surrounding properties at 80 and 120 Lister Avenue in Newark, New Jersey, the Lower Passaic River Study Area ("LPRSA") and the Newark Bay Study Area. The EPA Site ID number is NJD980528996.

This request seeks the following information be copied and provided to me by electronic means (preferred) or by mail.

1. All documents and communications relating to the development of the LPRSA Focused Feasibility Study ("FFS"), including but not limited to the 2007 draft FFS, the 2014 final FFS and proposed plan, any proposed or actual modifications to the 2014 FFS and proposed plan, and any other related reports.
2. All documents and communications regarding reaction to public comments submitted on the 2014 FFS and proposed plan, including but not limited to internal correspondence, meeting notes, document markups, or comments provided to another government agency.
3. All documents and communications relating to the LPRSA Remedial Investigation / Feasibility Study, including but not limited to internal correspondence, meeting notes, document markups, or comments provided to another government agency.
4. All documents and communications relating to past, present, or future dredging in the LPRSA.

5. All documents and communications relating to ecological risk assessment or human health risk assessment in the LPRSA.
6. All documents and communications relating to EPA's conceptual site model for the LPRSA.
7. All documents and communications regarding a confined aquatic disposal or confined disposal facility remedial option for the LPRSA.
8. All documents and communications regarding meetings or conversations with the Cooperating Parties Group, or any of its members, agents, attorneys, or consultants relating to the LPRSA.
9. All documents and communications sent to or received from Occidental Chemical Corporation (OxyChem), Maxus Energy Corporation, Tierra Solutions, Inc. (f/k/a Chemical Land Holdings, Inc.), or Diamond Shamrock Chemical Company, or any of their employees, agents, attorneys, or consultants relating to the LPRSA.
10. All documents and communications regarding meetings or conversations with Occidental Chemical Corporation (OxyChem), Maxus Energy Corporation, Tierra Solutions, Inc. (f/k/a Chemical Land Holdings, Inc.), or Diamond Shamrock Chemical Company, or any of their employees, agents, attorneys, or consultants relating to the LPRSA.
11. All communications and records of meetings regarding the LPRSA with any other governmental agency, including the United States Environmental Protection Agency, the United States Army Corps of Engineers, the State of New Jersey, the New Jersey Department of Environmental Protection, the National Oceanic and Atmospheric Administration, or the United States Fish and Wildlife Service.
12. All communications and records of meetings regarding the LPRSA with the Passaic River Community Advisory Group ("CAG") or individual members of the CAG.
13. All communications and records of meetings regarding the LPRSA with a federal, state, or local elected official or his or her staff.
14. All documents and communications regarding conversations, meetings, or planned or completed outreach with a federal, state, or local elected official or his or her staff relating to the LPRSA.

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15. All communications and records of meetings regarding the LPRSA with the Sierra Club, the Passaic River Coalition, The Gateway Group, or any other non-governmental group or organization.
16. All communications and records of meetings regarding the LPRSA with a member of the press, including but not limited to print, radio, television, and Internet reporters or bloggers.
17. All documents and communications sent to or received from Judith Enck, Catherine McCabe, Mathy Stanislaus, James Woolford, Becky Clark, Pam Barr, Betsy Southerland, Steve Ells, Walter Mugdan, George Pavlou, Stephanie Vaughn, Ray Basso, Alice Yeh, Elizabeth Butler, Eugenia Naranjo, Tom Taccone, Jennifer LaPoma, Eric Stern, David Kluesner, Marian Olsen, Mark Greenberg, Chuck Nace, Alan Steinberg, Lisa Jackson, Kathleen Callahan, Lisa Baron, Peter Weppner, Beth Buckrucker, Beth Franklin, Joe Seebode, Todd Bridges, Scott Nicholson, Robert Engler, Col. Paul Owen, Col. John R. Boulé II, Tim Kubiak, Clay Stern, Reyhan Mehan, Jay Fields, Scott Douglass, or Elkins Green relating to the LPRSA.
18. All documents and communications regarding the LPRSA with the National Remedy Review Board or the Contaminated Sediments Technical Advisory Group.
19. All documents and communications that evaluate, discuss, or otherwise concern the possible effect on Passaic River bridges by implementation of a proposed or actual remedial option in the LPRSA.
20. All documents and communications that evaluate, discuss, or otherwise concern the possible effect on vehicular, rail, boat, or other traffic by implementation of a proposed or actual remedial option in the LPRSA.
21. All documents and communications regarding journal articles or other publications authored, or presentations given, by Anthony Wolfskill, Brent Finley, Carol Dinkins, David Rabbe, Dennis Paustenbach, Richard Wenning, Rick McNutt, Steven Huntley, or Timothy Iannuzzi.
22. All documents and communications regarding Occidental Chemical Corporation (OxyChem), Maxus Energy Corporation, Tierra Solutions, Inc. (f/k/a Chemical Land Holdings, Inc.), or Diamond Shamrock Chemical Company as a potentially responsible party in the LPRSA.
23. All documents and communications regarding hazardous substances discharged by the 80 and 120 Lister Avenue facility to the LPRSA.

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24. All documents and communications regarding the 80 and 120 Lister Avenue facility as a source of alleged contamination in the LPRSA.
25. All documents and communications regarding enforcement actions, notices of violation, directives, notice letters, administrative orders, decrees, or settlement agreements involving Occidental Chemical Corporation (OxyChem), Maxus Energy Corporation, Tierra Solutions, Inc. (f/k/a Chemical Land Holdings, Inc.), or Diamond Shamrock Chemical Company relating to the Diamond Alkali Superfund Site.
26. All documents and communications regarding the need for early action, interim remedial measures, or source control in the LPRSA.
27. All documents and communications regarding the Passaic River Restoration Initiative.
28. All documents and communications regarding the development of the April 20, 1994 Administrative Order on Consent, Index No. II-CERCLA-0117, in the matter of the Diamond Alkali Superfund Site, Passaic River Study Area, signed by Occidental Chemical Corporation.
29. All documents and communications regarding the development of the 2004 Section 122(h) Agreement, CERCLA Docket No. 02-2004-2011, in the matter of the Lower Passaic River Study Area of the Diamond Alkali Superfund Site, signed by the parties set forth on Appendix A of the Agreement.
30. All documents and communications regarding the Unilateral Administrative Order for Removal Response Activities, CERCLA Docket No. 02-2012-2020, in the matter of the Lower Passaic River Study Area Portion of the Diamond Alkali Superfund Site, issued to Occidental Chemical Corporation on June 25, 2012.

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June 29, 2015
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Your prompt attention to this matter is greatly appreciated. Please contact me at your earliest convenience to discuss arrangements for providing the requested documents. This firm will take responsibility for any necessary copying and/or shipping charges.

I look forward to receiving your response. Thank you for your anticipated cooperation.

Sincerely,



Justin D. Smith

OPRA Request

June 29, 2015
Page 5

To: Administrative Record File

From: Sarah Flanagan, Assistant Regional Counsel

Date: February 29, 2016

Re: Diamond Alkali – Lower 8.3 Miles of Lower Passaic River Study Area/Late Comments

EPA received a number of submissions months after the close of the comment period, including: (1) a letter dated March 18, 2015 from the Nereid Boat Club; (2) a pre-printed post card dated April 22, 2015 from a resident of Newark; (3) a letter dated May 20, 2015 from the Hudson County Chamber of Commerce; (4) a letter dated August 7, 2015 from Senator Cory Booker and Congressman Albio Sires; (4) four letters dated April 17, July 14, September 29 and December 29, 2015, from William H. Hyatt, Jr., Coordinating Counsel, Lower Passaic River Study Area Cooperating Parties Group (CPG), enclosing numerous documents; and (5) documents and a presentation submitted by members of the CPG in a meeting with EPA Deputy Administrator Stan Meiburg on December 11, 2015, which was documented in a summary prepared by EPA.

As documented in the Responsiveness Summary, consistent with EPA's "Revised Guidance on Compiling Administrative Records for CERCLA Response Actions" (September 2010), the comments have been labelled as "Late Comments" and added to the administrative record file. EPA has reviewed the late comments, including the documents enclosed with them. As explained in the Responsiveness Summary, consistent with 40 C.F.R. § 300.825(c), the comments are included in the administrative record file as Late Comments, as opposed to being incorporated into the administrative record for the selection of the remedy, because none of the comments, or other information submitted with the comments, substantially support the need to significantly alter EPA's selected remedy. Moreover, much of the information is somewhat or entirely duplicative of information contained in the administrative record file.

The documents enclosed with Mr. Hyatt's letters also have been included in the administrative record file, except for the following documents that were submitted as enclosures to the letter dated December 29, 2015 from William H. Hyatt, Jr. These were not included in the administrative record file because they were identified by the New Jersey Department of Environmental Protection (NJDEP) as privileged documents that were inadvertently produced to the CPG by NJDEP pursuant to a request made by the CPG under the New Jersey Open Public Records Act, N.J.S.A. 47-1A-1 et seq.:

A-37: October 1, 2012, Draft FFS Report for the Lower 8 Miles of the LPR by Louis Berger

A-45: October 9, 2008, Talking points prepared for Commissioner Jackson to deliver at the Third Passaic River Symposium

A-47: September 8, 2008, Draft report by Louis Berger to NJDEP

A-48: July 1, 2008, Memorandum from Louis Berger to NJDEP

A-52: February 8, 2008, Updated technical memorandum "Review of staging and processing and disposal areas, transportation logistics, treatment technologies and historical search areas for LPR 6-mile source control dredge plan."

A-54: January 8, 2008, Technical memo updated "Revised mapping of 2,3,7,8-TCDD concentrations using indicate kriging & revised erodibility in LPR sediments

A-59: September 7, 2007, LPR Source Control Dredge Plan draft "HEC-RAS modeling report."

A-60: September 7, 2007, Draft environmental dredging pilot study report

A-61: July 7, 2007, Review and comments on draft "Source control early action FFS" prepared by EPA Region 2

A-64: May 8, 2007, Memorandum from D. Risilia (NJDEP) to J. McGregor (NJDEP)

A-70: April 1, 2007, Louis Berger Memo to NJDEP

A-86: November 21, 2006, Briefing for Lower Passaic River Project Executive Committee Meeting

A-88: November 14, 2006, Draft agenda for November 15, 2006 Six Agency Meeting on Preliminary Draft FFS Comments

A-95: September 7, 2006, Draft interim report by Louis Berger to NJDEP, "Overlays of Areas of Potential Erodibility with Three-Dimensional Representation of 2,3,7,8-TCDD Concentration in Lower Passaic River Sediments"

A-96: September 5, 2006, PDT document from NJDEP titled "Passaic River Remediation Issues"

A-104: May 25, 2006, Louis Berger to NJDEP "Mapping of 2,3,7,8-TCDD, 4,4'-DDT, PCB and Hg concentrations in LPR sediments."

A-107: April 26, 2006, Letter from T. Lewis (Louis Berger) to M. Burlingame (NJDEP)

A-126: February 15, 2006, Draft agenda for March 1, 2006 Lower Passaic River Restoration Project Agency Only Partnership Meeting

A-151: November 9, 2005, Agenda for Passaic River Project Managers' Meeting with Consultant Team

A-166: June 2005, EPA, *Draft Project Plans for Environmental Dredging Pilot Study*

A-168: April 7, 2005, E-mail from Janine MacGregor to Megan Brunatti

A-174: March 2, 2005, NJDEP Draft Directive and notice to insurers

A-175: March 2005, Passaic River and Newark Bay: Remediation and Restoration, Presentation to Commissioner Campbell (according to handwritten note on page 1)

A-301: February 28, 1994, Memo from A. Hayton (NJDEP) to the file.

Flanagan, Sarah

From: John Dickinson <John.Dickinson@dol.lps.state.nj.us>
Sent: Friday, February 26, 2016 5:55 PM
To: Flanagan, Sarah
Subject: Diamond Alkali - Lower Passaic Administrative Record

Sarah, the following documents submitted for inclusion into the lower Passaic administrative record under cover of William H. Hyatt Jr.'s December 29, 2015 letter to EPA, are privileged documents inadvertently produced to the Cooperating Parties Group by NJDEP pursuant to a request made by the CPG under the New Jersey Open Public Records Act, N.J.S.A. 47-1A-1 et seq.:

A-37: October 1, 2012, Draft FFS Report for the Lower 8 Miles of the LPR by Louis Berger;

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A-175: March 2005, Passaic River and Newark Bay: Remediation and Restoration, Presentation to Commissioner Campbell (according to handwritten note on page 1); and

A-301: February 28, 1994, Memo from A. Hayton (NJDEP) to the file.

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